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Affidavits of Support: Another Option for Divorcing Immigrant Spouses

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In addition to seeking spousal maintenance, divorcing immigrants who moved to the United States to get married might have another, and perhaps better, way to seek support - suing to enforce the affidavit of support signed by their sponsoring spouses.

In Illinois, spousal maintenance is a complicated issue with a vast body of interpretative case law. As a result of the inconsistent outcomes from the circuit courts, the Illinois General Assembly recently passed statutory maintenance guidelines, which judges can only deviate from if there is a strong justification for doing so.[1]

But in addition to traditional maintenance, another option might be available for immigrants who move to the United States for the specific purpose of getting married. Sponsors of these immigrants must sign an affidavit of support, agreeing to support them at an annual rate of not less than 125 percent of the federal poverty line.[2]

As courts are beginning to enforce these affidavits in concert with divorce proceedings, family law practitioners need to be aware of their impact. This article will first take a brief look at Illinois' new maintenance guidelines, then explore this additional support option for immigrant spouses.

Illinois' maintenance guidelines

Illinois' new statutory maintenance guidelines took effect on January 1, 2015. (For more about the guidelines, see Brian A. Schroeder, *The New Illinois Spousal Maintenance Law: Retroactive or Prospective?*, Ill. B.J. (Jan. 2015).)

Under the guidelines, which apply to couples with a combined annual gross household income under $250,000, the court must first determine whether it is appropriate for either party to receive maintenance. For example, if both parties have a comparable income and are well educated, young, and healthy, the court may decide maintenance is not necessary.

If, however, the court deems it a "maintenance case," the guidelines provide a formula for determining the amount and duration of the maintenance award.[3] Under the formula, the payee receives the difference between 30 percent of the payor's income and 20 percent of the payee's income. Maintenance may not exceed 40 percent of the sum of the parties' combined gross income and the payee's gross income.

The duration of support is calculated by multiplying the number of years of marriage by the appropriate guideline factor. Specifically, the factor is .2 for marriages of 0-5 years, .4 for marriages of 5-10 years, .6 for marriages of 10-15 years, .8 for marriages of 15-20 years, and for marriages of 20 years or longer, maintenance may be permanent.

If the parties' combined annual gross household income is over $250,000, the court considers the length of the marriage, the needs of the recipient party, the earning capacity of each party, the duration of the marriage, and other factors.[4]

The problem for immigrant spouses

Under both the new maintenance guidelines and pre-guidelines case law, the longer the marriage, the higher the likelihood of a maintenance award. The length of the marriage is a key factor in determining both the amount and duration of maintenance, and a short marriage generally results in minimal maintenance. For example, a woman married for two years could receive little or no maintenance if she is young, healthy, and well educated.

For an immigrant marriage, this has serious consequences. A young woman moving from overseas may not know anyone in the U.S. Her husband is likely sponsoring her immigration application, and she might not be legally permitted to work (depending on her visa) or might need to retrain and complete credentials that are more acceptable in the U.S., requiring her to make the necessary contacts in a foreign land. Women who move to join their husbands already living here often find themselves totally beholden to their spouses financially.

Moreover, due to cultural pressures, these women may be reluctant to return to their countries of origin. Young women in particular may be subject to abuse and isolated without access to the resources they need. While the same could apply to immigrant men, statistics indicate that the majority of people affected are young women.

Illinois' new maintenance guidelines provide little relief for an immigrant spouse whose marriage doesn't last long, because the duration of the maintenance is directly related to the length of the marriage.

Enforcing an affidavit of support

Importantly, in addition to pursuing traditional maintenance awards, immigrant spouses can also seek to enforce their sponsoring spouse's affidavit of support under contract principles. Pursuant to the Immigration Nationality Act ("INA"), the affidavit of support is a legally enforceable contract that the sponsored alien can sue to enforce in any state or federal court.[5]

By filing an affidavit of support, a sponsor agrees to support the sponsored immigrant at an annual rate of not less than 125 percent of the federal poverty line. The support must continue until a triggering termination event occurs - e.g., the sponsored immigrant becomes a naturalized citizen, completes 40 qualifying quarters (approximately 10 years) of work, dies, or becomes capable of providing for himself or herself. Divorce, however, is not a terminating event.

Since the INA explicitly grants subject matter jurisdiction over affidavit of support enforcement actions to *any* court, claims are often raised in divorce proceedings. One of the seminal cases in this area is *Naik v. Naik*, decided by a New Jersey appellate court.[6]

The case involved parties who were married in India. After the marriage, the husband, Sumeru, first returned to the U.S. and then sponsored the immigration application of his wife, Urvi. The parties had contact solely via telephone for 15 months and had only met in person briefly before their wedding.

When Urvi came to the U.S., she discovered that the parties were completely incompatible, and the marriage broke down shortly thereafter. In fact, the Naiks contend that the marriage was never consummated, and each alleged severe mental cruelty against the other.

The New Jersey trial court entered a dual judgment of divorce and denied Urvi any maintenance. Specifically, after hearing testimony, the trial court contended that maintenance was unwarranted based upon "the very short duration of the marriage; the young ages of the parties; the fact that no children were born of the marriage; and that both parties are in good physical and emotional health."[7]

The judge found the wife to be a well-educated person, who had a diploma in mechanical engineering and was fluent in Hindi and Gujarati and practically fluent in English. The marriage did not keep the wife from the job market, and she demonstrated no plans to return to school or to rehabilitate herself in any way.

Urvi successfully appealed the trial court's judgment and (remarkably) argued the appeal pro se. Urvi contended on appeal that Sumeru was bound by the affidavit of support that he filed when petitioning to sponsor Urvi's permanent residence, or green card, application. The appellate court agreed and, in determining how much support Urvi was entitled to, wrote as follows:

> the sponsor is not necessarily required to pay the sponsored immigrant 125 percent of the Federal Poverty Guidelines.... Rather, considering the sponsored immigrant's own income, assets and other sources of support, the sponsor must pay any deficiency in order to meet this minimum level or floor. In short, the sponsored immigrant is expected to engage in gainful employment, commensurate with his or her education, skills, training and ability to work in accordance with the common law duty to mitigate damages. When the sponsor and sponsored immigrant are married, alimony, child support (if any) and equitable distribution of income-producing assets must be included in the sponsored immigrant's available support. Therefore, although [the Affidavit of

> Support] is an independent obligation, it is impacted by other monetary obligations set by the court in a matrimonial action.
>
> Therefore, after setting spousal and child support and equitable distribution, the court should only consider [an Affidavit of Support] if the sponsored immigrant's sources of support fall below 125 percent of the Federal Poverty Guidelines....
>
> In that case the sponsor is required to pay the deficiency only. If the sponsored immigrant's sources of support exceed this level, then no [additional] support is mandated by the INA. Moreover, the duration of standard alimony and [support pursuant to an Affidavit of Support] may differ. The [divorce court] sets the amount and duration of spousal support pursuant to N.J.S.A. 2A:34-23b and its interpreting case law. The obligation to pay...support [pursuant to an Affidavit of Support] continues until one of the statutory terminating events occurs....[8]

Illinois precedent

A 2011 Rule 23 opinion from the Illinois Appellate Court, Second District, arguably supports the notion that an affidavit of support is relevant to awarding maintenance.[9] In *Amin*, the trial court awarded an immigrant wife 18 months of maintenance, and she was allowed to seek further maintenance upon filing a petition for review within the 18-month period.

Note that the maintenance lasted roughly as long as the marriage itself (it began in January 2006 and the parties separated in September 2007). This could be construed as a nod to the extenuating circumstances of an immigrant spouse, who leaves a home thousands of miles away to start afresh in a new country.

On appeal to the second district, the immigrant spouse argued that the trial court failed to properly consider the affidavit of support that her husband had completed when applying for her green card. Ultimately, the second district held there was no abuse of discretion since the trial court did consider the affidavit of support and awarded $1,200 per month in maintenance when 125 percent of the federal poverty guidelines was only $1,128 per month.

The court stated that "[t]he record clearly reflects that the trial court considered the Affidavit of Support, in addition to the statutory factors and the applicable case law in discussing and ruling on the issue of maintenance."[10] While the court did not elaborate on the mechanics of how the trial court should consider an affidavit of support, it nonetheless supports the proposition that consideration is proper.

Conclusion

Despite the new Illinois maintenance guidelines and the other statutory factors, the affidavit of support should bind the sponsor. The amount of support awarded should not be less than 125 percent of the poverty guidelines, and the duration of support can be up to 10 years.

Ironically, the same immigration sponsorship system that has held so many women financially hostage might now give them a way to leave a marriage by choice. Interestingly, these cases have not only been brought by immigrant women but, in some instances, argued - in appellate courts, no less - pro se by immigrant women themselves.

The challenge for practitioners is how to counsel both clients who intend to marry and sponsor an immigrant and those who plan to immigrate and be sponsored. A prenuptial agreement might be the best way to define parties' obligations. In the meantime, matrimonial lawyers who serve immigrant clients should monitor the developing case law.[11]

1. 750 ILCS 5/504.
2. Department of Homeland Security, Form I-864EZ, Affidavit of Support Under Section 213A of the Act, *available at* ***http://www.uscis.gov/sites/default/files/files/form/i-864ez.pdf*** .
3. 750 ILCS 5/504(b-1).
4. *Id.* § 5/504(a).
5. See generally 8 C.F.R. § 213a.2.
6. *Naik v. Naik*, ***399 N.J. Super. 390*** (App. Div. 2008).
7. *Id.* at 393.
8. *Id.* at 398-99.
9. *In re Marriage of Amin*, 2011 IL App (2d) 100431-U.
10. *Id.* ¶ 32.
11. For a good overview of all the family law-related impacts of an affidavit of support, see Veronica Tobar Thronson, *'Til Death Do Us Part: Affidavits of Support and Obligations to Immigrant Spouses*, 50 Fam. Ct. Rev. 594 (Oct. 2012).